89-550

Supreme Court, U.S.
FILED
AUG 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.:

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

LINDA CANTRELL AND HUSBAND,
JEWELL CANTRELL,

Petitioners

v.

ROBERT N. BUCHANAN, JR., M.D.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSE MIDDLE DIVISION

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32 pp

QUESTION PRESENTED FOR REVIEW

Whether the statute of limitations, Tennessee Code Annotated Section 29-26-116, violates the due process rights of plaintiff, Linda Cantrell, by barring her medical malpractice claim before her cause of action ever accrued?

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LIST OF ALL PARTIES TO THE ACTION

All parties to this action are named in the caption of the case to the Court.

REFERENCE TO ALL REPORTS OF OPINIONS DELIVERED BELOW

None of the opinions delivered below were published.

GROUNDS ON WHICH JURISDICTION IS INVOKED

On June 5, 1989, the Supreme Court of Tennessee denied the plaintiff permission to appeal this action. On March 22, 1989, the Court of Appeals of Tennessee, Middle Section at Nashville, affirmed the August 10, 1988 ruling of the Third Circuit Court for Davidson County, Tennessee, granting defendant's motion for summary judgment in this action.

Plaintiffs believe that 28 U.S.C. section 1257(a) confers jurisdiction on this Court to review the judgment by writ of certiorari.

STATUTES AND CONSTITUTIONAL PROVISIONS

Tennessee Code Annotated Section 29-26-116

(a) (3):

> In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The plaintiff, Linda Cantrell, first saw defendant, Dr. Buchanan, on April 22, 1967, for treatment of acne. She was then 18 years old. Dr. Buchanan prescribed x-ray treatments for Linda's condition. These treatments continued periodically from April 22, 1967, until January 1975. The total treatment was at least 750 rads. Her thyroid gland was subjected to radiation exposure during these treatments.

On June 30, 1986, Linda Cantrell sought medical treatment for a nodule in her neck, and a nodule in her nose. The nodule in her nose was removed on August 25, 1986, and proved to be metastatic papillary thyroid carcinoma.

Linda had additional surgery on September 19, 1986, to remove additional cancer in her body, as well as to remove

her thyroid. Following the surgery, Dr. J. Michael Crane, the surgeon, spoke to Linda's entire family. Dr. Crane told them that Linda's cancer was caused by the radiation therapy she had received many years earlier. This was the first time Linda Cantrell discovered that her cancer was caused by Dr. Buchanan's care and treatment of her acne.

Linda Cantrell filed this action on September 11, 1987, alleging malpractice and fraudulent concealment. The Third Circuit for Davidson County granted the defendant's Motion for Summary Judgment on August 10, 1988, holding that Tennessee Code Annotated Section 29-26-116(3) barred Linda Cantrell's claim because she brought her action more than three years after the date on which the negligent act or omission occurred.

The plaintiffs' raised the constitutional question on appeal to the Tennessee Court of Appeals during oral argument. Despite the fact that the Tennessee Court of Appeals found the circumstances of this case to be compelling, that Court affirmed the trial court's order granting the defendant's Motion for Summary Judgment based on the three years statute of repose found in Tennessee Code Annotated Section 29-26-116(3), ruling that the constitutional argument raised by the plaintiffs' was addressed and rejected in Jones v. Morristown-Hamblen Hospital Assn., Inc., 595 S.W.2d 816 (Tenn. Ct. App. 1979). The Tennessee Court of Appeals stated:

> "Jones held that, under due process principles, '[a] statute of limitation . . . may not be given retrospective application so as to bar an accrued right of action, but may bar a cause of action which has

not yet accrued or vested.' Jones, 595 S.W.2d at 820. After Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974), discovery became a condition precedent to the accrual of a right of action for medical malpractice. When the Medical Malpractice Review Board and Claims Act took effect on July 1, 1975, the plaintiff in Jones had not discovered her injury and, therefore, had no accrued right of action. Since retrospective application of what is now Tenn. Code Ann. section 29-26-116(a) would not impair a vested right, the court held such application constitutional.

In the present case, as in Jones, the plaintiffs' had not discovered the injury as of July 1, 1975, when the Medical Malpractice Review Board and Claims Act took effect. Since there was no accrued right of action, retrospective application of Tenn. Code Ann. section 29-26-116(a) (3) does not constitute a denial of due process.

The Jones dissent does not help the plaintiffs' case. The dissenting judge based his opinion on factors not involved in the present case.

Courts have rejected similar due process challenges to Tennessee's statute of repose for products liability cases. See Wayne v. Tennessee Valley Authority, 730 F.2d 392 (5th Cir. 1984), cert.

denied, 469 U.S. 1159 (1985); Mathis v. Eli Lilly and Co., 719 F.2d 134 (6th Cir. 1983). Both Wayne and Mathis include discussions as to the rationality of the products liability statute of repose. In its equal protection analysis in Harrison, the Supreme Court concluded:

> This Court cannot say that there is not a reasonable basis for the separate classification of health care providers or that this classification bears no legislative objective of reducing and stabilizing insurance and health costs and protecting the public as a whole. Indeed, at the time Sec. 23-3415(a) [now sec. 29-26-116(a)] was passed, 'there was indubitably a valid reason for the distinction made' by the statute.

Harrison, 569 S.W. 2d at 827 (quoting Dobbins v. Terrazzo Machine & Supply Co., 479 S.W. 2d 806, 810 (Tenn. 1972). Moreover, rational basis analysis is unnecessary where there is no right deserving of due process protection. Thus, the court in Mathis stated:

> In tort claims, there is no cause of action and therefore no vested property right in the claimant upon which to base a due process challenge until injury actually occurs. An injury in the nature of a tort which occurs after a specified limitation period, such as the discovery of cancer, as in the instant case, does not give rise to due process protection.

Mathis, 719 F.2d at 141. This reasoning was the basis of the majority opinion in Jones."

ARGUMENT FOR APPROVAL OF PETITION

This case clearly falls within the jurisdictional requirements of 28 U.S.C. section 1257(a) for allowance of the writ of certiorari, in that the validity of a Tennessee statute is drawn in question on the ground of its being repugnant to the Constitution of the United States. Tennessee Code Annotated Section 29-26-116(a) (3) bars a plaintiff's claim for

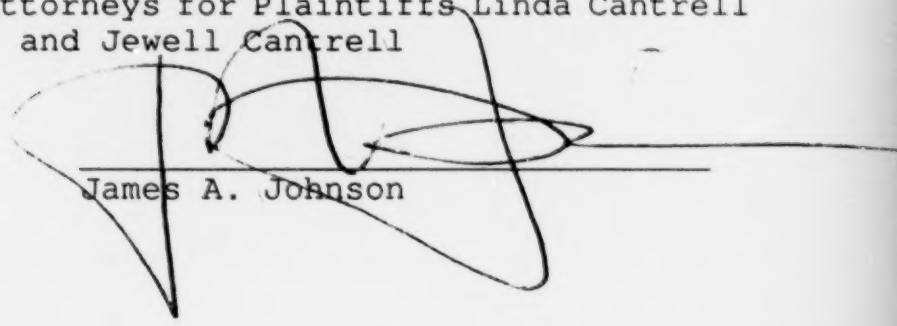
medical malpractice before her cause of action ever accrues, thereby denying a plaintiff of a property right without due process of law.

The Tennessee courts have considered this constitutional question and ruled against Linda Cantrell. The Supreme Court of the United States has the power to grant this Petition, and make a final ruling on this constitutional question.

The plaintiffs' respectfully request this Court to grant this Petition for Writ of Certiorari.

Dated this 26th day of September 1989.

JOHNSON, WEIS, PAULSON & PRIEBE, S.C.
Attorneys for Plaintiffs Linda Cantrell and Jewell Cantrell



James A. Johnson

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August 10, 1988

IN THE THIRD CIRCUIT COURT FOR
DAVIDSON COUNTY,

TENNESSEE

LINDA CANTRELL AND	)	
JEWELL CANTRELL	)	
	)	No. 87C-3069
VS.	)	
	)	
ROBERT N. BUCHANAN, JR., M.D.	)	

MEMORANDUM

This medical malpractice case is before the Court on the defendant's motion for summary judgment. For the reasons stated below, the motion is granted.

From April, 1967 through January, 1975 plaintiff Linda Cantrell received radiation therapy treatment for acne. In August, 1986 Linda Cantrell was diagnosed as suffering from cancer of the thyroid. She alleges that the defendant was negligent in administering radiation treatments and that

the treatments caused the cancer. The defendant asserts three bases for summary judgement: that he met the standard of care in his treatment of Linda Cantrell,[1] that the treatment did not proximately cause the injury claimed[2] and that this suit is barred by the statute of limitations. This third issue is determinative.

The defendant's statute of limitations argument has two aspects. First, the defendant contends that the plaintiffs did not file their suit within one year of discovering that Ms. Cantrell had tyroid cancer. T.C.A. § 29-26-116(a)(2). This is not the appropriate legal standard, however. Foster v. Harris, 633 S.W.2d 304 (Tenn. 1982). In Foster the plaintiff contacted serum hepatitis, the source of which was initially unknown to him, when the disease was first discovered. Later it

was determined that it was caused by the tortious conduct of his dentist. The defendant moved for summary judgment on the ground that suit was filed more than one year after the disease was discovered. The trial court dismissed the case and the Court of Appeals affirmed. The Supreme Court reversed and held that the one year statute of limitations did not begin to run until the plaintiff discovered that a negligent act was the source of the disease and the identity of the tortfeasor. Id. at 305. In this case such discovery did not occur until September 12, 1986. Linda Cantrell's affidavit. In that this suit was filed on September 11, 1987, summary judgment on this ground is denied.

The defendant's second argument regarding the statute of limitations is based upon T.C.A. § 29-26-116(3) which provided:

> In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

In some circumstances a physicians' failure to disclose to a patient information regarding treatment may constitute fraudulent concealment. Hall v. DeSaussure, 41 Tenn. App. 572, 581-83 (1956). Ray v. Schiebert, 484 S.W.2d 748, 753: Duncan v. Leeds, 742 F.2d 989, 992 (6th Cir. 1984). The plaintiffs contend that Dr. Buchanan knew or should have known of the risks and dangers associated with radiation therapy, that he knew or should have known that such treatment could cause cancer and that he never advised Linda Cantrell of any risk of cancer. Amended Complaint ¶ ¶ 2,3; affidavit of Linda Cantrell ¶ 5. There is no evidence in the record that he had knowledge of any wrong done. The contention that he "should have known" is insufficient. Albert v. Sherman, 67 S.W.2d 140, 167 Tenn. 133, 136 (1933). The limitation period, therefore, was not tolled and the action is barred by T.C.A. § 29-16-116(3).

The defendant's motion for summary judgment is granted. Costs are taxed to

the plaintiff. Defendant's counsel is requested to prepare the order.

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[1]The only competent evidence on this issue are the affidavits of Frank G. Witherspoon, M.D., and of Bernard J. Pass, M.D. They support defendant's contention that his treatment of Linda Cantrell met the standard of care. The affidavit of Stanton Marks, M.D., is not competent under T.C.A. § 29-26-115(b) and, therefore, has not been considered. However, there is a genuine issue both as to the total number of treatments given and regarding the use of shielding during treatment; both of those issues impact the Witherspoon and Pass testimony.

[2]The affidavit of pathologist Jere W. Baxter, M.D. supports the contention that the radiation treatment did not proximately cause Linda Cantrell's thyroid cancer. He states that "none of the normal or abnormal tissue removed during the September 19, 1986 surgical procedure discloses any evidence of damage or change caused by exposure to radiation." The affidavit, however, does not indicate whether some observable change or damage to such tissue is always present in each instance where radiation exposure is casually related to the development of thyroid cancer. The Court can make no presumption in that regard.

s/ Matthew J. Sweeney, III
Judge

August, 1988

IN THE THIRD CIRCUIT COURT FOR
DAVIDSON COUNTY
TENNESSEE

LINDA CANTRELL AND HUSBAND, JEWELL CANTRELL,	)	
Plaintiffs,	)	No. 87c-3069
v.	)	
ROBERT N. BUCHANAN, JR., M.D.	)	
Defendant.	)	

ORDER

This cause came on to be heard before the Honorable Matthew J. Sweeney, III, Judge of the Third Circuit Court for Davidson County, upon the motion of the defendant, Robert N. Buchanan, Jr., M.D., for a summary judgment in his favor.

Following argument on the motion, the Court entered its Memorandum Opinion, a copy of which is Exhibit "A" and is incorporated herein by reference.

There is no genuine issue as to any

material fact and the defendant is entitled to judgment in his favor as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff's action is dismissed with prejudice. Costs are taxed to the plaintiffs and their surety for which let execution issue if necessary.

s/ Matthew J. Sweeney, III, Judge

March 22, 1989

E X H I B I T A

LINDA CANTRELL AND JEWELL CANTRELL,	)	
Plaintiffs-Appellants,	)	
vs.	)	No. 88-334II Davidson Law
ROBERT N. BUCHANAN, JR., M.D.	)	
Defendant-Appellee.	)	

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

OPINION

The trial court dismissed the plaintiffs' medical malpractice claim on the grounds that it is barred by the applicable statute of limitations, Tenn. Code Ann. §29-26-116(a) (1980). The plaintiffs appeal.

The facts relevant to this appeal can be briefly stated. From April of 1967 until January of 1975, plaintiff-appellant Linda Cantrell received intermittent

radiation treatments while under the care of defendant-appellee Dr. Robert Buchanan for acne. In late August or early September of 1986, Mrs. Cantrell learned that she had cancer. According to the plaintiffs, on either September 12 or September 19, 1986, Mrs. Cantrell first discovered that her cancer was caused by the radiation therapy she received under Dr. Buchanan's care.

On September 11, 1987, the plaintiffs filed this malpractice action against Dr. Buchanan alleging negligence and intentional deceit. The defendant moved for summary judgment. The trial court granted the motion on the ground that Tenn. Code Ann. §29-26-116(a)(3) bars the action.

Under Tenn. Code Ann. §29-26-116(a)(1), the statute of limitations in medical malpractice actions is one year. Tenn.

Code Ann. §29-26-116(a)(2) codifies the discovery rule. However, Tenn. Code Ann. §29-26-116(a)(3) establishes a 3-year statute of repose:

> In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred . . .

Only in cases involving fraudulent concealment or negligent leaving of a foreign object in a patient's body is the three-year cap inapplicable. See Tenn. Code Ann. §29-26-116(a)(3)-(4).

In the present case, the latest date on which any alleged negligence occurred is January of 1975. Suit was filed in September of 1987, more than three years after the negligent act. This case does not involve a foreign object. In their appeal, the plaintiffs do not assign error to the trials court's finding that there is

no evidence to indicate fraudulent concealment. Therefore, Tenn. Code Ann. 29-26-116(a)(3) bars the claim.

On appeal, the plaintiffs request that this court avoid the harsh consequences of Tenn. Code Ann. §29-26-116(a)(3) by applying the discovery rule. The discovery rule would not bar this action filed on September 11, 1987 since Mrs. Cantrell did not discover the alleged source of her cancer until, at the earliest, September 12, 1986. See Foster v. Harris, 633 S.W.2d 304 (Tenn. 1982).

The circumstances of this case are compelling: Tenn. Code Ann. §29-26-116(a)(3) bars the plaintiffs' right to seek redress before they even knew about the injury. Despite the harshness of this result, this court cannot simply abrogate the legislature's enactment. The Supreme

Court upheld the constitutionality of Tenn. Code Ann §29-26-116(a)(3) in Harrison v. Schrader, 569 S.W.2d 822, (Tenn. 1978). (The court took notice of the medical malpractice insurance crisis which prompted the legislature to enact the three-year cap.) The court noted that, in the absence of constitutional defects, such policy matters are for the legislature, not for the courts. Id.

At oral argument, the plaintiffs raised a constitutional issue not addressed in Harrison v. Schrader. Relying on Jones v. Morristown-Hamblen Hospital Assn., Inc., 595 S.W.2d 816 (Tenn. Ct. App. 1979), the plaintiffs assert that applying Tenn., Code Ann. §29-26-116(a)(3) retrospectively so as to cut off the plaintiffs' right to redress before they had discovered the injury.[1]

The constitutional issue raised by the plaintiffs was addressed and rejected in Jones. Jones held that, under due process principles, "[a] statute of limitation . . may not be given retrospective application so as to bar an accrued right of action, but may bar a cause of action which has not yet accrued or vested." Jones, 595 S.W.2d at 820. After Teeters v. Currey, 518 S.W.2d (Tenn. 1974), discovery became a condition precedent to the accrual of a right of action for medical malpractice. When the Medical Malpractice Review Board and Claims Act took effect on July 1, 1975, the plaintiff in Jones had not discovered her injury and, therefore, had not accrued right of action. Since retrospective application of what is now Tenn. Code Ann. §29-16-116(a) would not impair a vested right, the court held such application constitutional.

In the present case, as in Jones, the plaintiffs had not discovered the injury as of July 1, 1975 when the Medical Malpractice Review Board and Claims Act took effect. Since there was not accrued right of action, retrospective application of Tenn. Code Ann. §29-26-116(a)(3) does not constitute a denial of due process.

The Jones dissent does not help the plaintiffs' case. The dissenting judge based his opinion on factors not involved in the present case.

Courts have rejected similar due process challenges to Tennessee's statute of repose for products liability cases. See Wayne v. Tennessee Valley Authority, 730 F.2d 392 (5th Cir. 1984), cert. denied, 469 U.S. 1159; Mathis v. Eli Lilly and Co., 719 F.2d 134 (6th Cir. 1983). Both Wayne and Mathis include discussions as to the

rationality of the products liability statute of repose. In its equal protection analysis in Harrison, the Supreme Court Concluded:

> This Court cannot say that there is no reasonable basis for the separate classification of health care providers or that this classification bears no reasonable relation to the legislative objective of reducing and stabilizing insurance and health costs and protecting the public as a whole. Indeed, at the time Sec. 23-3415(a) [now §29-26-116(a)] was passed, "there was indubitably a valid reason for the distinction made" by the statute.

Harrison, 569 S.W.2d at 827 (quoting Dobbins v. Terrazzo Machine & Supply Co., 479 S.W.2d 806, 810 (tenn. 1972)). Moreover, rational basis analysis is unnecessary where there is no right deserving of due process protection. Thus, the court in Mathis stated:

> In tort claims, there is no cause of action and therefore no vested property right in the claimant upon

> which to base a due process challenge until injury actually occurs. An injury in the nature of a tort which occurs after a specified limitation period, such as the discovery of cancer, as in the instant case, does not give rise to due process protection.

Mathis, 719 F.2d at 141. This reasoning was the basis of the majority opinion in Jones.

The judgment of the court below is affirmed and the cause is remanded to the Circuit Court of Davidson County for the collection of the costs in that court. Tax the costs on appeal to the appellant.

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[1]Tenn. Code Ann. §29-16-103 (repealed 1985) provided that the Medical Malpractice Review Board and Claims Act would "not affect any malpractice actions commenced or filed before July 1, 1975." From this provision, the Jones court concluded that the legislature intended the Act to have retrospective application "since any suit filed after July 1, 1975, would fall within the Act's provisions without regard to the date of the negligent act giving rise to the cause of action." Jones, 595 S.W.2d at 819. In 1985, the legislature repealed all

sections of the Act concerning the medical malpractice review board, including Tenn. Code Ann. §39-26-103. See Act of April 8, 1985, ch. 184, §4, 1985 Tenn. Pub. Acts, 340, 341. However, the plaintiffs do not argue (and this court should find no reason to conclude) that this repeal indicated a legislative intent to preclude retrospective application of the remaining provisions of the Act. Rather, the legislature repealed the review board provisions because the board had gone out of existence §4(a), 1985 Tenn. Pub. Acts 341.

s/ Ben H. Cantrell, Judge

Concur:

s/ Henry F. Todd, Presiding Judge

s/ William C. Koch, Jr., Judge

June 5, 1989

IN THE SUPREME COURT OF TENNESSEE
AT
NASHVILLE

LINDA CANTRELL AND HUSBAND, JEWELL CANTRELL,	)	
Appellants,	)	
vs.	)	Davidson Circuit
ROBERT N. BUCHANAN, JR., M.D.	)	No. 88-334-II
Appellee.	)	

IN RE: APPLICATION FOR PERMISSION TO APPEAL OF LINDA CANTRELL AND HUSBAND, JEWELL CANTRELL

Upon consideration of the application for permission to appeal and brief in support thereof of Linda Cantrell and Husband, Jewell Cantrell, the answer of Robert N. Buchanan, Jr., M.D., the opinion of the Court of Appeals and the record in the cause,

Permission to appeal is denied at the cost of appellants.

PER CURIAM

Supreme Court, U.S.
FILED
OCT 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-550

In The

Supreme Court of the United States

October Term, 1989

LINDA CANTRELL and husband,
JEWELL CANTRELL

Petitioners,

– vs.

ROBERT N. BUCHANAN, JR., M.D.

Respondent.

**On Petition For a Writ of Certiorari To
The Court of Appeals of Tennessee**

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Robert N. Buchanan, Jr., M.D., submits this Brief in support of his request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Tennessee Court of Appeals.

STATEMENT OF CASE

This action arises from the medical treatment rendered to the petitioner Linda Cantrell by the respondent, Dr. Robert Buchanan, Jr., on seven visits from April, 1967 through January, 1975. As part of this medical care and in compliance with the standard of care at that time, the petitioner received radiation treatments for intractable acne. In August of 1986, the petitioner was diagnosed as suffering from cancer of the thyroid. On either September 12 or September 19, 1986, the petitioner Linda Cantrell claims that she first discovered that her cancer allegedly was caused by the radiation therapy she received while under the respondent's medical care. (See page 2 of the Memorandum Opinion of the Tennessee Court of Appeals, which is included in the petitioners' Appendix at page 8a.) The petitioners filed suit against the respondent on September 11, 1987 – more than twelve years after the last medical treatment rendered by the respondent.

The respondent moved for summary judgment in the Third Circuit Court for Davidson County, Tennessee, based upon the three-year statute of repose applicable to medical malpractice cases in Tennessee, i.e., T.C.A. § 29-26-116(a)(3). This statute provides as follows:

> In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists. T.C.A. § 29-26-116(a)(3).

The trial court agreed with the respondent that the three (3) year statute of repose barred the petitioners' cause of action. Accordingly, the trial court granted the respondent's Motion for summary judgment. The judgment of the trial court was subsequently affirmed by the Tennessee Court of Appeals. The petitioners then filed an Application with the Tennessee Supreme Court for permission to appeal pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure. On June 5, 1989, the Tennessee Supreme Court denied the petitioners' Application for Permission to Appeal. The petitioners then filed this Petition for Writ of Certiorari.

The petitioners' main challenge in this case concerns the constitutionality of the Tennessee three-year statute of repose for medical malpractice cases, i.e., T.C.A. § 29-26-116(a)(3). Specifically, the petitioners now allege that this statute denies them of a property right without due process of law. The petitioners failed to raise this issue, however, in the trial court. Indeed, as the petitioners themselves acknowledge at Page 5 of their Petition for Writ of Certiorari, the present constitutional challenge to T.C.A. § 29-26-116(a)(3) was not raised until the oral argument before the Tennessee Court of Appeals.

SUMMARY OF ARGUMENT

The petitioners failed to raise their present constitutional challenge to T.C.A. § 29-26-116 (the three-year statute of repose for medical malpractice actions in Tennessee) at the state trial court. Moreover, the petitioners have failed to show that the Tennessee Supreme Court ever considered the petitioners' constitutional attack on the statute. On the contrary, the Order issued by the Tennessee Supreme Court in this case recites merely that the petitioners' Application for Permission to Appeal is denied. No reference is made to the constitutional issue now raised by the petitioners. As this Court has stated in its previous rulings, when the highest state court has failed to pass upon a federal question, it is assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show to the contrary. The petitioners have failed to make such an affirmative showing in the instant case.

The respondent further submits that the three-year statute of repose involved in this case (T.C.A. § 29-26-116) is not violative of the petitioners' due process rights. The constitutionality of the statute has been upheld by the Tennessee courts. As applied to the facts of the instant case, the three-year statute of repose merely served to bar a cause of action which had not yet accrued or vested. Accordingly, the statute did not deprive the petitioners of a vested property right.

Based on all of the above, the respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

ARGUMENT

I. THE PETITIONERS FAILED TO RAISE THEIR PRESENT CONSTITUTIONAL ATTACK ON T.C.A. § 29-26-116(a)(3) AT THE TRIAL COURT LEVEL. AS A RESULT, THE TENNESSEE SUPREME COURT DID NOT RULE UPON THE ISSUE.

The petitioners assert in their Petition for Writ of Certiorari that the important question of law involved in this case is whether T.C.A. § 29-26-116 of the Tennessee Medical Malpractice Review Board and Claims Act of 1975 violates the due process rights of the petitioner, Linda Cantrell, by barring her medical malpractice claim before her cause of action ever accrued. This issue was not raised by the petitioners, however, at the trial court level. The Tennessee Attorney General's Office was not notified of a constitutional challenge to the statute as required by Rule 24.04 of the Tennessee Rules of Civil Procedure, Rule 32 of the Tennessee Rules of Appellate Procedure, and Rule 28.4(c) of the Rules of the Supreme Court of the United States.

The first time the petitioners raised their present challenge to the constitutionality of T.C.A. § 29-26-116(a)(3) was during the oral argument before the Court of Appeals. Indeed, this fact is acknowledged by the petitioners on page 5 of their Petition for Writ of Certiorari. Moreover, the petitioners have not established that their constitutional challenge to T.C.A. § 29-26-116 was considered by the Supreme Court of the State of Tennessee.

The petitioners have failed to satisfy the clearly-established requirement of showing that the constitutional issue was properly presented to the highest state

court for consideration. *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541, 68 S.Ct. 682, 92 L.Ed. 863 (1948). The importance of this requirement has been set forth as follows:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of the constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though states are not free to avoid constitutional issues on inadequate state grounds, . . . they should be given the first opportunity to consider them. *Cardinale v. State of Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969).

When the highest state court has failed to pass upon a federal question, as in the instant case, it will be assumed that the omission was due to want of proper presentation in the state courts, *unless the aggrieved party can affirmatively show the contrary. Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3, 103 S.Ct. 2296, 76 L.Ed.2d 497, 504 (1983). The case of *Exxon Corp. v. Eagerton*, supra, is similar to the instant case in that the appellants failed to raise their federal preemption challenge to a state statute in the trial court. Although the appellants addressed this issue in their Brief before the Alabama Supreme Court, that Court did not pass on the issue. In ruling that it had no jurisdiction to consider the preemption issue, this Court stated as follows:

> . . . Nor does anything in the record before us indicate that this issue was raised in the trial

> court. Appellants did address the EPAA in their brief before the Supreme Court of Alabama, but that court did not pass on the issue. Under these circumstances we have no jurisdiction to consider whether the EPAA preempted the application of the pass-through prohibition to oil, for it does not affirmatively appear that the issue was decided below. The general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3, 103 S.Ct. 2296, 76 L.Ed.2d 497, 504 (1983) (citations omitted).

The Tennessee appellate courts follow the same, well established rule, and refuse to pass upon any question raised for the first time on appeal. *Shelton v. Martin*, 180 Tenn. 454, 176 S.W.2d 247 (1943). As a general rule, the Tennessee courts will not even consider on rehearing that which was not at issue in the original hearing. *Nashville v. Wilson*, 88 Tenn. 407, 12 S.W. 1082 (1848).

More recently, in *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978), the Tennessee Supreme Court was presented with the same issue under nearly identical circumstances. Indeed, the appellants' particular challenge in *Harrison v. Schrader* involved the exact question as is involved in the instant case, i.e., whether the three-year statute of repose of T.C.A. § 29-26-116 could be applied retroactively, consistent with due process, to foreclose appellants' cause of action before it ever accrued. The Tennessee Supreme Court noted, however, that the appellants' challenge to the retroactive application of the statute had not been raised in the trial court. *Harrison v. Schrader*, 569 S.W.2d at 828. In refusing to consider the appellants' new challenge to the statute made for the first time on appeal, the Tennessee Supreme Court stated as follows:

> . . . Counsel may not be heard, at this late date, to revive this action by the injection of a new and different issue.
>
> . . . In civil cases, this Court will not, as a general rule, pass upon any question raised for the first time on appeal. Nor will we consider on rehearing that which was not at issue in the original hearing. *Harrison v. Schrader*, 569 S.W.2d at 828 (citations omitted).

As in *Harrison v. Schrader*, supra, the petitioners' failure in the instant case to raise their constitutional challenge to T.C.A. § 29-26-116 at the trial court level should result in this Court's refusal to consider the issue. The respondent submits that the petitioners should not, at this late date, be allowed to unduly prolong this matter by the injection of a new and different issue.

II. TENNESSEE COURTS HAVE UPHELD THE CONSTITUTIONALITY OF T.C.A. § 29-26-116 IN PREVIOUS RULINGS.

The Tennessee Supreme Court upheld the constitutionality of T.C.A. § 29-26-116 in *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978). Significantly, the facts involved in *Harrison v. Schrader* are quite similar to the facts involved in the instant case. In *Harrison v. Schrader*, a vasectomy was performed upon the petitioner in an allegedly negligent fashion in 1972. On July 1, 1975, the Medical Malpractice Review Board and Claims Act of 1975, including the three-year statute of repose which is the subject of the instant action, became effective. Shortly after learning on December 18, 1975 that his wife was pregnant, the petitioner Harrison consulted a second

physician and learned that his vasectomy had been performed in a negligent fashion. He then filed suit against the doctor involved on September 22, 1976.

Based on the three-year statute of repose in what is now T.C.A. § 29-26-116(a)(3), the defendant doctor in *Harrison v. Schrader* moved to dismiss on the ground that the action was filed more than three years after the alleged negligent act or omission and was, therefore, time barred. The trial court granted the Motion and dismissed the action. *Harrison v. Schrader*, 596 S.W.2d at 824.

On appeal, the Tennessee Supreme Court specifically upheld the constitutionality of the three-year statute of repose. In doing so, the Court recognized that at the time the Medical Malpractice Review Board and Claims Act of 1975 was passed, " . . . this State and the Nation were in the throes of what was popularly described as a 'medical malpractice insurance crisis'." *Harrison v. Schrader*, 569 S.W.2d at 826. In addition, the Court noted:

> . . . it is understandable that a legislature intent upon halting such phenomenal increases would seek some method to increase the certainty of such estimates, i.e., an absolute three-year limit on the time within which actions could be brought. *Harrison v. Schrader*, 569 S.W.2d at 826.

In upholding the constitutionality of the statute in question, the Court stated that "there was indubitably a valid reason for the distinction made by the statute." *Harrison v. Schrader*, 569 S.W.2d at 827.

In *Jones v. Morristown-Hamblen Hospital Association, Inc.*, 595 S.W.2d 816 (Tenn. App. 1979), the Tennessee Court of Appeals was faced with the identical issue involved in the instant case. The alleged negligent act

involved in *Jones v. Morristown-Hamblen Hospital Association, Inc.*, (i.e, the failure of a doctor to recognize that a microscopically-examined specimen was malignant) occurred on June 2, 1970. As noted above, the Medical Malpractice Review Board and Claims Act of 1975 became effective on July 1, 1975. On January 13, 1976, the patient learned of the existence of malignancies in her lungs and brain. She died on May 31, 1976, and suit was filed against the doctor on January 7, 1977.

The Court in *Jones v. Morristown-Hamblen Hospital Association, Inc.*, supra, held that although the negligent act occurred on June 2, 1970, the patient's cause of action did not *accrue* until January 13, 1976 – the date she discovered the existence of the malignancies. *Jones v. Morristown-Hamblen Hospital Association, Inc.*, 595 S.W.2d at 819. Pursuant to the three-year statute of repose, however, she could not bring a lawsuit after June 2, 1973 – three years after the alleged negligent act. Accordingly, the three-year limitation contained in the statute of repose expired prior to the accrual of the cause of action.

The Court in *Jones v. Morristown-Hamblen Hospital Association, Inc.*, supra, further stated that although a statute of limitation may not be given retrospective application so as to bar an *accrued* right of action, it *may* bar, consistent with due process, a cause of action which has not yet accrued or vested. *Jones v. Morristown-Hamblen Hospital Association, Inc.*, 595 S.W.2d at 820. Since the cause of action does not accrue in Tennessee until the discovery of the injury, *see Teeters v. Currey*, 518 S.W.2d 512 (Tenn. 1974), the plaintiff's alleged cause of action in *Jones v. Morristown-Hamblen Hospital Association, Inc.* did not accrue until after the three-year limitation period

contained in the statute of repose had expired. In light of the fact that the plaintiff did not have an accrued cause of action at the time the statute expired, the Court held that the three-year limitation period contained in the Tennessee statute of repose applied to the action and barred the lawsuit. *Jones v. Morristown-Hamblen Hospital Association, Inc.*, 595 S.W.2d at 821. Moreover, the Tennessee Court of Appeals stated that the retrospective application of the statute of repose constituted the clear intent of the legislature in enacting the Medical Malpractice Review Board and Claims Act. *Jones v. Morristown-Hamblen Hospital Association, Inc.*, 595 S.W.2d at 821.

As in *Jones v. Morristown-Hamblen Hospital Association, Inc.*, the petitioner Linda Cantrell's cause of action in the instant case did not accrue until after the expiration of the three-year statute of repose. That is, her cause of action did not accrue until September of 1986 – the date she claims to have discovered that her cancer allegedly was caused by the radiation therapy she received while under the respondent's medical care. The last medical treatment rendered by the respondent, however, was in January of 1975. This means that the three-year statute of repose expired in January of 1978. Since the petitioner's cause of action had not yet accrued when the three-year statute of repose expired in January of 1978, there is no due process violation. As in *Jones v. Morristown-Hamblen Hospital Association, Inc.*, supra, the three-year statute of repose in the instant case merely served to bar a cause of action which had not yet accrued or vested.

In light of the fact that the three-year statute of repose, as applied in the instant case, barred a cause of

action which had not yet accrued or vested, the respondent respectfully submits that the petitioners' Petition for a Writ of Certiorari should be denied. The petitioner Linda Cantrell simply did not have a vested property right at the time the statute of repose expired. Under such circumstances, there is no due process violation.

CONCLUSION

The petitioners failed to raise their present challenge to T.C.A. § 29-26-116(a)(3) at the trial court level. They should not be allowed the opportunity to raise the issue concerning the constitutionality of the statute for the first time on appeal.

The petitioners have failed to establish that their constitutional challenge to T.C.A. § 29-26-116(a)(3) was properly presented and considered by the Tennessee Supreme Court. Indeed, the Tennessee Supreme Court made no reference to any constitutional issues in denying the petitioners' Application for Permission to Appeal. When the highest state court has failed to pass upon a federal question, it is assumed that the omission was due to want of proper presentation in the state courts. Significantly, the aggrieved party has the affirmative burden to show to the contrary. The petitioners failed to carry this burden in the instant case.

Even if the petitioners had properly raised their challenge to T.C.A. § 29-26-116 in the trial court, the respondent submits that the petitioners' Petition for Writ of Certiorari should be denied due to the lack of a due process defect in the statute. Furthermore, the Tennessee

courts have upheld the constitutionality of the statute in previous rulings. As the Tennessee Supreme Court pointed out in *Harrison v. Schrader*, supra, in upholding the constitutionality of the three-year statute of repose contained in T.C.A. § 29-26-116(a)(3):

> Undeniably some hardship results from the application of this statute, but it is not the role of this Court to pass upon the wisdom or lack thereof of the legislation under review. In the absence of constitutional infirmity such matters are ones of policy solely for the legislature. *Harrison v. Schrader*, 569 S.W.2d at 828.

Based on all of the above, the respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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